

ORAL ARGUMENT NOT YET SCHEDULED

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

CALIFORNIA COMMUNITIES AGAINST
TOXICS, *et al.*,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY, *et al.*,

Respondents.

No. 21-1024 (consolidated
with 21-1034)

STATE PETITIONERS' NON-BINDING STATEMENT OF ISSUES

Pursuant to the Court's Order of January 26, 2021, the State of California, by and through Attorney General Xavier Becerra, and the California Air Resources Board; the States of Delaware, Illinois, Maryland, New Jersey, New York, Oregon, Rhode Island, Washington, and Wisconsin; the Commonwealths of Massachusetts, Pennsylvania, and Virginia; the Cities of Chicago and New York (collectively, "State Petitioners") submit the following non-binding, preliminary statement of issues to be raised in this case regarding the final rule of the United States Environmental Protection Agency ("EPA"), "Reclassification of Major Sources as

Area Sources Under Section 112 of the Clean Air Act,” 85 Fed. Reg. 73,854 (Nov. 19, 2020) (“Final Rule”).

1. Whether the Final Rule violates Section 112 of the Clean Air Act, 42 U.S.C. § 7412, or is arbitrary and capricious, because it allows major sources of hazardous air pollutants to be reclassified as non-major “area” sources and avoid congressionally mandated requirements applicable to major sources.

2. Whether EPA exceeded its statutory authority or acted unlawfully by allowing major sources of hazardous air pollutants to be reclassified as non-major “area” sources and avoid congressionally mandated requirements applicable to major sources.

3. Whether, even if major sources of hazardous air pollutants could reclassify as non-major “area” sources, EPA exceeded its statutory authority, acted unlawfully, or promulgated an arbitrary and capricious Final Rule by allowing such reclassification to automatically absolve a major source’s obligation to achieve the “maximum degree of reductions” or otherwise permitting increases in the source’s emissions.

4. Whether EPA exceeded its statutory authority or acted unlawfully by removing the requirement of federal enforceability from the regulatory definition of “potential to emit” at 40 C.F.R. section 63.2 through an “interim ministerial revision” without public notice and comment.

5. Whether the Final Rule is arbitrary and capricious because it removes the requirement of federal enforceability from the regulatory definition of “potential to emit” at 40 C.F.R. section 63.2 without providing an alternative means of ensuring enforceability.

6. Whether the Final Rule is arbitrary and capricious because it lacks factual support, ignores the concerns underlying the policy that it supersedes, and fails to address the rationale of the preceding policy rejecting an interpretation of Section 112 of the Clean Air Act, 42 U.S.C. § 7412 that allows major sources to be reclassified as non-major “area” sources.

Dated: Feb. 25, 2021

Respectfully Submitted,

FOR THE STATE OF CALIFORNIA

XAVIER BECERRA
Attorney General of California
ROBERT W. BYRNE
EDWARD H. OCHOA
Senior Assistant Attorneys General
MYUNG J. PARK
DAVID A. ZONANA
Supervising Deputy Attorneys General
KELLY WELCHANS
JONATHAN A. WIENER
Deputy Attorneys General

/s/ Meredith J. Hankins
MEREDITH J. HANKINS
Deputy Attorney General
300 South Spring Street, Suite 1702
Los Angeles, CA 90013
Tel: (213) 269-6177
Meredith.Hankins@doj.ca.gov

*Attorneys for Petitioner State of
California, by and through its Attorney
General Xavier Becerra, and California
Air Resources Board*

FOR THE STATE OF DELAWARE

KATHLEEN JENNINGS
Attorney General

/s/ Christian Douglas Wright
CHRISTIAN DOUGLAS WRIGHT
Director of Impact Litigation
VALERIE EDGE

JAMESON TWEEDIE
Deputy Attorneys General
Delaware Department of Justice
820 N. French Street
Wilmington, DE 19801
Tel: (302) 577-8600
Christian.Wright@delaware.gov
Valerie.Edge@delaware.gov
Jameson.Tweedie@delaware.gov

*Attorneys for Petitioner State of
Delaware*

FOR THE STATE OF ILLINOIS

KWAME RAOUL
Attorney General
MATTHEW J. DUNN
Chief, Environmental
Enforcement/Asbestos Litigation
Division

/s/ Daniel I. Rottenberg
DANIEL I. ROTTENBERG
Assistant Attorney General
Office of the Attorney General
69 W. Washington Street, 18th Floor
Chicago, IL 60602
Tel: (312) 814-3816
drottenberg@atg.state.il.us

*Attorneys for Petitioner State of
Illinois*

FOR THE STATE OF MARYLAND

BRIAN E. FROSH
Attorney General

/s/ Joshua M. Segal
JOSHUA M. SEGAL
Special Assistant Attorney General
Office of the Attorney General
200 St. Paul Place
Baltimore, MD 21202
Tel: (410) 576-6446
jsegal@oag.state.md.us

*Attorneys for Petitioner State of
Maryland*

FOR THE COMMONWEALTH OF
MASSACHUSETTS

MAURA HEALEY
Attorney General

/s/ Carol Iancu

CAROL IANCU
Assistant Attorney General
Office of the Attorney General
One Ashburton Place
Boston, MA 02108
Tel: (617) 963-2428
Carol.Iancu@mass.gov

*Attorneys for Petitioner
Commonwealth of Massachusetts*

FOR THE STATE OF NEW YORK

LETITIA JAMES
Attorney General

/s/ Gavin G. McCabe

GAVIN G. MCCABE
BRIAN LUSIGNAN
Assistant Attorneys General
ASHLEY GREGOR
Special Assistant Attorney General
Environmental Protection Bureau
28 Liberty Street, 19th Floor
New York, NY 10005
Tel: (212) 416-8469
Gavin.McCabe@ag.ny.gov

*Attorneys for Petitioner State of New
York*

FOR THE STATE OF NEW JERSEY

GURBIR GREWAL
Attorney General

/s/ Lisa Morelli

LISA MORELLI
Deputy Attorney General
Division of Law
25 Market St., PO Box 093
Trenton, NJ 08625-093
Tel: (609) 376-2745
Lisa.Morelli@law.njoag.gov

*Attorneys for Petitioner State of New
Jersey*

FOR THE STATE OF OREGON

ELLEN F. ROSENBLUM
Attorney General

/s/ Paul Garrahan

PAUL GARRAHAN
Attorney-in-Charge
STEVE NOVICK
Special Assistant Attorney General
Natural Resources Section
Oregon Department of Justice
1162 Court Street NE
Salem, OR 97301-4096
Tel: (503) 947-4593
Paul.Garrahan@doj.state.or.us
Steve.Novick@doj.state.or.us

*Attorneys for Petitioner State of
Oregon*

FOR THE COMMONWEALTH OF
PENNSYLVANIA

JOSH SHAPIRO
Attorney General
MICHAEL J. FISCHER
Chief Deputy Attorney General

/s/ Ann R. Johnston

ANN R. JOHNSTON
Senior Deputy Attorney General
Office of Attorney General
Strawberry Square
Harrisburg, PA 17120
Tel: (717) 857-2091
ajohnston@attorneygeneral.gov

*Attorneys for Petitioner
Commonwealth of Pennsylvania*

FOR THE STATE OF RHODE ISLAND

PETER F. NERONHA
Attorney General

/s/ Gregory S. Schultz

GREGORY S. SCHULTZ
Special Assistant Attorney General
Rhode Island Office of Attorney
General
150 South Main Street
Providence, RI 02903
Tel: (401) 274-4400
gschultz@riag.ri.gov

*Attorneys for Petitioner State of
Rhode Island*

FOR THE COMMONWEALTH OF
VIRGINIA

MARK R. HERRING
Attorney General
PAUL KUGELMAN, JR.
Senior Assistant Attorney General
Chief, Environmental Section

/s/ Caitlin C. G. O'Dwyer
CAITLIN C. G. O'DWYER
Assistant Attorney General
Office of the Attorney General
Commonwealth of Virginia
202 North 9th Street
Richmond, VA 23219
Tel: (804) 786-1780
godwyer@oag.state.va.us

*Attorneys for Petitioner
Commonwealth of Virginia*

FOR THE STATE OF WASHINGTON

ROBERT W. FERGUSON
Attorney General

/s/ Emily C. Nelson
EMILY C. NELSON
Assistant Attorney General
Washington State Attorney General's
Office
P.O. Box 40117
Olympia, WA 98504
Tel: (360) 586-4607
Emily.Nelson@atg.wa.gov

*Attorneys for Petitioner State of
Washington*

FOR THE STATE OF WISCONSIN

JOSHUA L. KAUL
Attorney General

/s/ Lorraine C. Stoltzfus
LORRAINE C. STOLTZFUS
BRADLEY J. MOTL
Assistant Attorneys General
Wisconsin Department of Justice
Post Office Box 7857
Madison, WI 53707-7857
(608) 266-9226
stoltzfuslc@doj.state.wi.us

*Attorneys for Petitioner State of
Wisconsin*

FOR THE CITY OF CHICAGO

CELIA MEZA
Acting Corporation Counsel

/s/ Benna Ruth Solomon
BENNA RUTH SOLOMON
Deputy Corporation Counsel
REBECCA HIRSCH
Assistant Corporation Counsel
City of Chicago Department of Law
2 N. LaSalle Street, S. 580
Chicago, IL 60602
Tel: (312) 744-7764
Benna.Solomon@cityofchicago.org

*Attorneys for Petitioner City of
Chicago*

FOR THE CITY OF NEW YORK

JAMES E. JOHNSON
New York City Corporation Counsel

/s/Christopher G. King
CHRISTOPHER G. KING
New York City Law Department
100 Church Street
New York, NY 10007
(212) 356-2074
cking@law.nyc.gov

*Attorneys for Petitioner City of New
York*

CERTIFICATE OF SERVICE

I hereby certify that on February 25, 2021, I electronically filed the foregoing Petitioners' Non-Binding Statement of Issues with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to all registered CM/ECF users.

/s/ Meredith J. Hankins
MEREDITH J. HANKINS